UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

Allen, Texas

SANMINA-SCI CORPORATION

Employer

and **Case No. 16-UC-205**

IUE-CWA LOCAL UNION 787

Petitioner/Union

DECISION AND ORDER DISMISSING PETITION[1]

The Employer, Sanmina-SCI Corporation, is a Delaware corporation engaged in the business of manufacturing telecommunications transmission equipment in Allen, Texas.

The Petitioner filed a unit clarification petition under Section 9(a) of the National Labor Relations Act, and a hearing was held before a Hearing Officer of the National Labor Relations Board. Both parties filed briefs with me[2].

Petitioner seeks to clarify the unit as follows:

> All employees at the Employer's Allen, Texas facility who are performing work that was classified as bargaining unit work at the Employer's facility in Collins Technology Park in Richardson[3], Texas or that would have been

[1] The Employer filed a Motion to Dismiss Petition. It is not necessary that I rule on that Motion in light of the Decision and Order Dismissing Petition.
[2] The briefs submitted by both parties were duly considered. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Petitioner is engaged in commerce as defined by the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The Union is a labor organization within the meaning of the Act.
[3] Previous owners of the Richardson facility (Collins Radio, Rockwell International and Alcatel USA) recognized Petitioner as the collective bargaining representative of the production and maintenance

classified as bargaining unit work had the Employer not transferred the bargaining unit to its Allen facility.

Excluding office clerical employees, guards, matrons, laboratory employees, engineers, draftsmen and supervisors as defined by the National Labor Relations Act, and all other employees.

On brief, Petitioner states that it seeks to clarify the 71 employees[4] who transferred to the Allen facility and argues that the 71 employees constitute a separate appropriate bargaining unit within the Allen facility. In particular, Petitioner seeks to clarify the bargaining unit to include the Employer's PCB assembly, systems test and integration, mechanical assembly, receiving and shipping employees. Petitioner states that 138 employees currently perform the bargaining unit work.

Petitioner argues that I should apply ***Harte & Co.,*** 278 NLRB 947 (1986), which holds in instances where the employer's business has been completely relocated, the collective bargaining relationship remains intact if the operations at the new facility are basically the same as at the old facility and if the transferees from the old facility constitute a substantial percentage (40% or more) of the new facility's employee complement.

The Employer, on the other hand, argues that Petitioner is seeking an accretion to the Richardson bargaining unit and urges that I follow the standards articulated in ***Gitano Distribution Center,*** 308 NLRB 1172 (1992). I decline to apply the Board's rationale announced in ***Gitano,*** because ***Gitano*** "is inapplicable to situations, where, as here, the

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employees in the Richardson facility and were parties to successive collective bargaining agreements since 1954. When the Employer acquired the Richardson facility, it recognized the Union as the employees' exclusive bargaining representative and negotiated its first collective bargaining agreement, which was in effect from August 25, 2001 until it expired on May 2, 2003.

[4] Sixty-nine Richardson bargaining unit employees transferred to the Allen facility on March 31, 2003. On a later date, two other former Richardson bargaining unit employees also transferred to Allen.

entire bargaining unit is relocated and there has been no creation of a second bargaining unit."

Although I find that application of the ***Harte*** analysis is appropriate, I conclude that the application of the ***Harte*** test compels that I dismiss Petitioner's petition because the Employer's Allen operation is not basically the same as its Richardson facility and the number of transferees from Richardson do not constitute a substantial percentage (40% or more) of the Allen facility's employee complement.

FACTS

Consolidation of Operations in Allen, Texas

The Employer's Allen facility is a consolidation of several acquisitions made from about Spring 2001 through 2003. The Employer purchased the Richardson, Texas production facility (where the bargaining unit employees were employed) from Alcatel USA, Inc. in Spring 2001.

The Richardson facility manufactured mechanical assemblies, subassemblies and other telecommunications equipment. Shortly after its acquisition of the Richardson facility, the Employer began to suffer considerable losses due to the economic decline of the telecommunications industry. The industry shifted toward "pure[5]" optical products and the traditional products produced by the Richardson facility were becoming obsolete.

Noting the shift toward pure optical products, the Employer began to focus on the production of these products and purchased Optronics, Inc. in November 2002 from Alcatel France. The Optronics facility provided optical communications products with an emphasis on optical system design, optical module assembly and subassembly.

[5] "Pure" optical provides a cleaner signal, can execute more commands in a single fiber and are more compact than traditional or hybrid telecommunication equipment.

The Employer also purchased optical manufacturing equipment from Alcatel to perform optical tests and component splicing. Alcatel, which was also a major customer of the Employer, produced, retrofitted and tested new “state of the art” 1640 optical products in its Allen, Texas production facility.

On January 3, 2003, Alcatel sold its Allen, Texas production facility to the Employer, who retained the 95 Alcatel Allen employees. The Alcatel acquisition included Alcatel’s Jupiter 1 operations, which enabled the Employer to manufacture the optical printed circuit boards (PCBs) in Allen. The Employer also obtained Alcatel’s Jupiter 3 R&D (research and design) operations in January 2003, which conducted research and design of new optical telecommunications products and equipment.

After these acquisitions, the Employer decided to consolidate most of the Richardson operations and all of its Optronics operations, Jupiter 3 R&D operations and the Jupiter 1 optical PCB manufacturing operations in its Allen plant. These actions enabled the Employer to design, manufacture, test and market all new optical technologies from its Allen facility.

The Employer moved Optronics from Plano, Texas to the Allen facility in January 2003. The Optronics move involved the moving of optical equipment and about 45 employees. Also in January 2003, the Employer moved its Jupiter 3 R&D (which consisted of 16 R&D employees and two managers) into the Allen facility from the former Alcatel Jupiter 3 plant.

In January 2003, the Employer announced to Petitioner that it was ceasing production at the Richardson facility and was going to offer transfers to some of the Richardson bargaining unit employees. Seventy-four Richardson bargaining unit employees were offered transfers to the Allen facility. Only 69 of the 74 employees who were extended an offer actually transferred to the Allen facility. The last working day for the Richardson bargaining unit employees was March 28, 2003 and the bargaining unit employees who accepted the Employer's offer began work at the Allen facility on March 30, 2003. Sometime before September 2003, two additional former Richardson bargaining unit employees became employed by the Allen facility.

In a further effort to consolidate its operations, the Employer merged its Plano Back Plane Operations into its Carrollton Cable Operations in April or May 2003. At a later date, the Carrollton Cable Operations were relocated to the Allen facility. The Employer also moved production from its Nogales, Mexico facility to its Allen facility.

The consolidation continued when the Employer moved seven or eight Q7 employees (also known as PCB NPI Quick Turn) from the Richardson facility to the Allen facility. The Q7 employees were not part of the Richardson bargaining unit.

The Richardson facility closed in late July 2003.

<u>Transfers From the Richardson Facility and the Composition of the Allen Workforce</u>

From March 28, 2003 through April 2003, the Employer relocated about 60% of its production employees and 60% of its equipment from the Richardson facility to the Allen facility. The remaining 40% of the Richardson facility's equipment was sold or discarded. As referenced above, the Employer's Q7 operations and persons responsible for winding down the facility remained until about June 2003, after which the Richardson facility was completely closed in late July.

As referenced above, when the Employer purchased the Allen facility from Alcatel, it retained 95 former Alcatel Allen employees. The Employer made offers to 74 of the 126 Richardson bargaining unit employees to relocate to the Allen facility, but only 69 employees accepted. Currently, the Employer's Allen facility employs 168 hourly production employees. Only 67 of the 168 hourly production employees (which is just under 40% of the workforce) formerly worked in the Richardson bargaining unit. The other employees were from the Allen facility or Optronics or were new hires. As referenced above, about 45 employees were former Optronics employees, 16 employees were former R&D employees from the Alcatel Jupiter 3 facility, and seven or eight employees were former Richardson Q7 employees.

Functional Integration

The Allen facility is functionally integrated. Both former Richardson bargaining unit employees and employees from other facilities work on Allen products. For example, the 1640-R2 is an optical "end to end" product. The Allen facility begins the manufacturing process at the receiving department, where the components are split between the optical components (which are sent directly to the Optical Assembly area's clean room) and the other components that are sent directly to the stockroom. Both former Richardson bargaining unit employees and other employees work in the stockroom.

After the components reach the stockroom, the stockroom employees release a kit to build one of the assemblies to the PCB assembly area, which is staffed by former Richardson bargaining unit employees. After the assemblies are built, the assemblies are split with some of the assemblies sent to the functional testing and integration department for in-circuit testing, while other assemblies are sent directly to optical assembly. The optical assembly employees also perform some tests on components.

After the assemblies pass in-circuit testing in the functional testing and integration area, they are sent directly to optical assembly. In the optical assembly department, the components are joined together and then the product is sent back to functional testing and integration for testing on the completed unit. After the functional test, the product goes through a quality test and a 72-hour environmental test. After these tests, the product undergoes final testing and then is sent to shipping. Throughout this process, both former Richardson bargaining unit employees and other employees handle the product.

The Allen receiving department receives components that are used for optical products and traditional products. Similarly, the Allen final inspection employees inspect both optical and traditional products. The Allen quality control department examines both traditional and optical products. The Allen purchasing department purchases materials for both traditional and optical products.

ANALYSIS

It is well settled that unit clarification proceedings are appropriate to resolve ambiguities concerning the placement of newly-established classifications of employees in an existing unit or in situations where an existing classification has "undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall into category—excluded or included—that they occupied in the past." ***Union Electric Co.,*** 217 NLRB 666, 667 (1975).

Unit clarification proceedings are also available to determine the placement of relocated employees. ***Armco Steel Co.,*** 312 NLRB 257 (1993).

As set forth in detail below, the Petitioner argues that ***Harte***, *supra,* with its two-pronged test should be applied. The Employer urges that an accretion analysis as described in ***Gitano***, *supra* should be applied. Although I agree that the facts in ***Harte*** are more similar to the facts in the instant case, I find that the Employer's Allen operation is not basically the same as the Richardson facility and that the number of transferees from Richardson to Allen do not constitute a substantial percentage of the Allen facility's employee complement. Accordingly, I will dismiss the instant Petition.

<u>Petitioner's Argument</u>

Petitioner asserts that the former Richardson bargaining unit employees constitute a separate and appropriate unit and that they should be clarified from the remaining Allen employees.

Petitioner cites ***J. R. Simplot Co.,*** 311 NLRB No. 61 (1993) as support. In ***J. R. Simplot,*** the Board held that limited elements of consolidation were not sufficient to make the plant a "new" operation. I find that Petitioner's reliance on ***J. R. Simplot*** is misplaced as the facts in ***J. R. Simplot*** are distinguishable from the instant case.

J. R. Simplot concerned the relocation of a food processing plant from Wenatchee, Washington to Quincy, Washington. The administrative law judge found that the new Quincy plant was not a new or different operation because the Quincy plant (which was about four times the size of the Wenatchee plant) continued to pack the same vegetables as the Wenatchee plant and that it handled some different foodstuffs because of its greater size. Importantly, the judge noted that all except one piece of the Wenatchee repacking equipment was relocated to the Quincy location and a newer model replaced that sole piece of equipment that was not relocated to Quincy.

Unlike ***J. R. Simplot,*** the Employer's operation has changed, having shifted away from traditional telecommunications products, and no longer relying upon the use of virtually all of the Richardson facility's equipment when producing its new, largely optical products. In addition, the Employer's production of optical equipment is not simply a result of having a larger production facility.

Petitioner also argues that the optical operations employees do not have significant interchange with the Richardson bargaining unit employees. The record does not support this assertion. Lead Technician Turner testified that part of his job is to locate parts needed by the technicians. When he is looking for parts, Turner enters the PCB assembly area, the inspection areas and the optical assembly area. Turner also has returned malfunctioning optical hybrid units to the optical assembly area for repair. Moreover, as referenced above, both former Richardson bargaining unit employees and other employees handle the Employer's products during the production process. Both Test Technician Fred Musgrove and PCB assembly employee Yolande Sanders testified that they do not know whether an assembly they are working on will go into a traditional Richardson product or an optical product. Based upon these facts, I find that there is substantial interchange between the optical assembly employees and the petitioned-for unit.

Nonetheless, the issue of whether the petitioned-for unit constitutes a separate appropriate unit is not dispositive of this matter. As Petitioner aptly notes, these facts require analysis under the standard articulated in ***Harte & Co.,*** 278 NLRB 947 (1986) because the transfer of the employees from Richardson to Allen constituted a total relocation of the Richardson bargaining unit. In ***Harte*** the Board ruled that, in instances where there is a total relocation of the bargaining unit, the collective bargaining relationship remains in effect if the operations at the new facility are basically the same operations as those at the old facility and if the transferees from the old facility constitute a substantial percentage (40% or more) of the new facility's employee complement. ***Harte & Co.,*** 278 NLRB 947 (1986).

The Union urges that the date for calculating whether the transferees from the Richardson facility constitute a substantial percentage of the new facility's employee complement is March 31, 2003, which was the date that "the transfers were substantially completed." ***Harte & Co.,*** 278 NLRB at 949.

As referenced above, the Employer purchased the Allen facility from Alcatel on January 3, 2003 and retained 95 former Alcatel Allen employees. The Employer also transferred 45 employees from Optronics in Plano, and 16 R&D employees from Alcatel's Jupiter 3 facility to the Allen facility in about January 2003. On March 31, 2003, the Employer moved about 69 of its Richardson bargaining unit employees to Allen.

I find, in agreement with the Petitioner, that the transfers were substantially completed on March 31, 2003. However, the number of Richardson bargaining unit transferees employed at the Allen facility on March 31, 2003 falls far short of the 40% of the employee complement required under ***Harte***. On March 31, 2003, the Employer employed 95 incumbent Allen employees, transferred another 45 employees from Optronics and 16 employees from the Jupiter 3 facility and transferred about 69 former Richardson bargaining unit employees for a total of 225 employees. The 69 former

Richardson bargaining unit employees comprise only 31% of the employee complement and therefore, the Union failed to establish the first prong of the ***Harte*** test.

The second prong of the ***Harte*** test is whether the Allen facility is "basically the same operation, simply removed to a new site." ***Harte & Co.,*** 278 NLRB 948. Although Petitioner argues that the Allen facility is "essentially the same plant with the addition of an independent high-end optical production", the evidence does not support this assertion.

In determining whether the operation remained the same, the Board examines the following factors[6]:

(1) Continuity of operations, methods, managerial hierarchy, customers and services and products;
(2) Distance between the old and new plants; and
(3) Changes in either the size makeup or the identity of the employee complement.

Applying these factors to the instant case, and as set forth below, it is clear that the Employer's Allen facility is not basically the same operation as its Richardson facility.

Continuity of Operations, Methods, Managerial Hierarchy, Customers, Services and Products

The Allen facility does not have the same operations, methods, management, customers, services or products as the Richardson facility. The Richardson facility's production was concentrated in traditional telecommunications equipment (which comprised 60% of their production) and hybrid (which comprised 40% of their production).

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[6] ***Westwood Import Co, Inc.,*** 681 F.2d 664, 110 LRRM 3248 (9th Cir. 1982) citing ***Tricor Products, Inc.,*** 239 NLRB 65, 68 (1978).

At the time of the Employer's acquisition of the Allen facility from Alcatel, the Allen facility produced the 1640-R1 and 1640-R2 and was producing and testing the 1603. Since that time, the Employer has greatly expanded its line of optical products. By the time the Richardson bargaining unit employees transferred to the Allen facility, the Allen facility had already received the 45 transferees from Optronics and the 16 R&D employees from Alcatel's Jupiter 3 facility. These acquisitions along with the employee transfers enabled the Employer to produce optical products. By the time the Richardson bargaining unit employees transferred to the Allen facility, the Allen facility was not the same operation as the Richardson facility.

Further evidence that the Allen facility is not basically the same operation as the Richardson facility is found when examining the nature of the work performed at both facilities. Currently 80% of the work performed at the Employer's consolidated Allen facility is the design, testing and manufacturing of optical communications and networking products that were not produced or tested by the Richardson bargaining unit employees. Only about 10% of the Allen facility's current production is "hybrid" with another 10% being traditional telecommunication products that were manufactured by the Richardson facility.

Different Methods of Production

In addition to the differences in products described above, the Allen facility uses different production methods than the Richardson facility. The Allen PCB assembly employees (all of whom transferred from the Richardson facility) spend most of their time working on optical products. The production of these new products requires the use of different equipment[7], different training and the use of different technology than the products produced by the Richardson facility. The parts utilized by the PCB assembly employees are much smaller and are set closer together. As a result, the PCB assembly employees require expertise and specific training to enable them to place the parts correctly.

The equipment used at the Allen facility demonstrates that the Allen facility is not the same as the Richardson facility. Although 50% to 60% of the equipment used by the PCB assembly employees came from the Richardson facility, the PCB assembly employees also use equipment that was brought from other facilities because of the complexity of the Allen products.

Different Job Duties

Examination of the Allen employees' job duties also indicates that the Allen facility is not basically the same operation as the Richardson facility. For instance, the Allen PCB assembly employees perform different tasks than they performed at the Richardson facility. At the Richardson facility, engineering personnel (who were non-bargaining unit employees) used the Automatic Optical Inspection machines. At the Allen facility, the PCB assembly employees conduct the Automatic Optical Inspection, as well as performing some assembly work for the Q7 department. The Allen PCB assembly employees also share tools and equipment with the Q7 employees and have assisted in NPI (new product introduction).

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[7]The production of optical products requires the use of specialized equipment such as the 5DX, which is an x-ray device used to examine soldered and connection joints and the AOI (automated optical inspection) device which uses an optical lens to examine the writing on components to ensure that the proper component is placed correctly on the board.

Likewise, the work performed by the Allen test technicians also shows that the Allen facility is not basically the same as the Richardson facility. The Allen test technicians (the majority of whom were already in the Allen facility before the transfer of the Richardson employees and were not bargaining unit employees) test both Richardson-type products and new optical products. However, the testing of Richardson-type products is more automated than that performed on the Allen optical products, which are performed manually and are more complex.

The Allen test technicians perform duties not performed at the Richardson facility, such as additional troubleshooting, test station repair and software duplication. Former Richardson bargaining unit employee and current Allen Test Technician Fred Musgrove acknowledged that he performs ACM (administrative communication module testing) at the Allen facility, but did not perform ACM testing while at the Richardson facility.

The Allen facility's mechanical assembly employees also perform work that was not performed at the Richardson facility. The Allen technicians build racks and cages for the circuit boards. About 50% of the racks they construct involve former Richardson products, the other 50% are for new products. Since the transfer of the employees to the Allen facility, the Employer has moved some of its PDU (power distribution units) production from its Nogales, Mexico facility to the Allen facility. As a result of the relocation of the PDU work to the Allen facility, the Allen employees now build their own PDUs, add cables to the PDUs and install the PDUs. Unlike the Allen facility, the

Richardson facility used pre-constructed PDUs[8] when constructing racks for circuit boards.

Some of the former Richardson employees perform maintenance and calibration on the machines, which are tasks they did not perform while at the Richardson facility.

The record also reflects that some former Richardson employees work in areas with employees who were not in the Richardson bargaining unit. For instance, PCB assembly employees occasionally assist the Q7 employees (who were not part of the Richardson bargaining unit).

Different Assembly Lines

An examination of the Allen facility's three PCB assembly lines also demonstrates that the Allen facility is not basically the same operation as the Richardson facility. Two of the lines are new, contain more complex equipment and were transferred to the Allen facility from another Sanmina (not Richardson) facility. The other line was transferred from the Richardson facility and has undergone significant updating including the installation of equipment to allow it to produce "high-complexity" boards. Before its reconfiguration at the Allen facility, the Richardson assembly line was incapable of producing some of the optical products currently produced by the Allen facility.

In-House Creation of Sub-Assemblies

Another indication of the Allen facility's change in production is evidenced by the in-house creation of sub-assemblies by the Allen facility. Although the Richardson facility received sub-assemblies from different vendors, the Allen facility builds its own sub-assemblies. Some of the sub-assemblies produced by the Allen facility require the

[8] When Alcatel owned the Richardson facility, it produced its own PDUs. After Sanmina purchased the Richardson facility, it ceased production of PDUs and purchased them already made.

use of wax string lacing, which requires additional training to use and was not used in the Richardson facility.

Other Changes in Production Methods

After the Employer moved its Carrollton operation to Allen in November 2003, the Employer's production methods underwent additional changes in that the move allowed the Employer to build optical fibers and "connectorize" them.

Another notable change in the Employer's methods of production is the elimination of the Richardson facility's stand-alone CRG department, which repaired returned merchandise. The Allen facility no longer has a CRG department. At Allen, repairs are handled along with production. The former Richardson CRG employees now work in either the Allen test department or the Allen production testing areas. Items requiring repair are now distributed to the test areas, sent back to receiving, then to inspection. After the repaired products are inspected, they are sent to shipping. The repair personnel work on both new Allen and Richardson products and customer returns.

Different Managerial Hierarchy

Another factor which indicates that the Allen facility is not basically the same as the Richardson facility is the Allen facility's managerial hierarchy. Although some of the Richardson managers transferred to the Allen facility, the Allen facility's management structure is markedly different from the Richardson management hierarchy. Only seven Richardson supervisors hold supervisory positions at the Allen facility, while 19 current Allen supervisors are not from the Richardson facility.

This change in the managerial hierarchy also resulted in some of the former Richardson bargaining unit employees being supervised by supervisors who were not

Richardson facility supervisors. For instance, test technician supervisor Joe Mott was not a supervisor at the Richardson facility and now supervises two former Richardson bargaining unit employees. Likewise, supervisor Darryl Taylor (who was not a former Richardson supervisor) supervises nine manufacturing employees, including some former Richardson bargaining unit employees.

In addition, Human Resource Director Micah Carlton (who handles all Allen facility human resource matters) joined the Allen facility in January 2003 and never worked at the Richardson facility.

Different Customers and Products

The Allen facility's customer list also demonstrates that it is not substantially the same as the Richardson operation. The Allen facility's customer list is considerably larger. The Richardson facility had five production customers: Alcatel (which was responsible for over 90% of the Richardson facility's work); Motorola; Newisys; Celion and Chiara. The Richardson facility also performed some work on prototypes for Santera and performed some work for X-Terra, Lucent Corporation and Netrake Corporation.

The Allen facility, on the other hand, has expanded its customer base to include the following: Alcatel; JDS Uniphase; Marconi; Santera; Chiaro Networks; Celion; X-Terra; Covaro; White Rock Networks; Meriton Networks; GE Medical; Lucent Corporation; Netrake Corporation; Yazaki Corporation; Vugate Corporation; Teradyne Systems; and Tropic Networks, Inc.

In addition to servicing different customers than the Richardson facility, the Allen facility also produces different products than the Richardson facility. The Richardson facility produced the following products: 1648 (Sonet Multiplexer); 1630 (Global

Synchronous Cross Connect); 1631 (Wideband Digital Cross Connect); 1633 (Digital Cross Connect); 1610 (Optical Amplifier, Transmission Family); and 1680 (OGX/OGM). The Richardson facility also conducted Empty Rack Tests and produced products for Newisys, Motorola, Celion and Chiara. It also produced some mechanical assemblies in the form of switches and 163X (1630, 1631 and 1633) assemblies. Indeed, the only Richardson facility products continuing to be produced at the Allen facility are: (1) 163X products[9], (2) two Chiaro printed circuit board assemblies; (3) a few Celion products, (4) some Motorola products and (5) some mechanical assemblies.

Although the Allen facility continues to produce the 163X products (which include the 1630, 1631, and 1633 and were Alcatel products), the production has changed since the closure of the Richardson facility. The Allen facility has decreased the number of 1630s it produces because Alcatel has issued a manufacturing discontinue notice, which will take effect in 2004. The 1631 is being upgraded and will be produced as a digital product with digital cabling. The 1633 is still considered an "active" product, but demand for the 1633 is expected to decrease unless it is upgraded.

The production of Richardson products 1648 and 1680 OGM have been discontinued. The Allen facility's work performed on the 1648 and the 1610 is limited to repairs, and the work performed on the 1680 OGM is limited to both testing and repairs and the OGX has been warehoused. The Allen facility no longer produces any products for Newisys.

In addition, the Allen facility produces new switches, such as new NPI switches, that were not produced in Richardson. The Allen facility also produces a new frame for

[9] About 50 to 60% of the production and testing of the 163X assemblies was performed at the Richardson facility.

Santera. Finally, the Allen facility produces the 1640 R1, which is a more advanced product than the 1648 that was produced by the Richardson facility. It has 80 times the density of the 1648 and is more expensive.

Different Cities

In addition to the above-described differences, the two facilities are located in different cities, which is another indication that the Allen facility is not basically the same operation as the Richardson facility.

Different Employee Complement

The Allen facility's employee complement includes the former Alcatel Allen employees, former Alcatel Jupiter 3 R&D employees, former Optronics employees, former Richardson Q7 employees, new hires as well as the former Richardson bargaining unit employees and former Richardson Q7 employees. These changes in the employee complement also support a finding that the Allen facility is not basically the same operation as the Richardson facility.

Conclusion under Harte Analysis

Application of the two-part ***Harte*** test compels that I dismiss the Petition because the transferred employees did not constitute a substantial number (40% or more) of the employee complement and because the Allen operation is not basically the same operation as the Richardson operation.

Petitioner urges that I examine the employee complement as it existed on March 31, 2003, which was the date the relocation process was "substantially concluded." ***Harte & Co.,*** 278 NLRB at 949. As referenced above, the Employer retained 95 of the Alcatel Allen employees when it purchased the Allen facility from Alcatel on January 3,

2003. Also in January 2003, the Employer moved 45 former Optronics employees from Plano, Texas and 16 R&D employees from its Jupiter 3 facility. In March 2003, the Employer moved 69 of its former Richardson employees to the Allen facility. On March 31, 2003, the employee complement consisted of 225 employees, 69 of whom were Richardson transferees. The Richardson employees comprised only 31% of the employee complement that existed on March 31, 2003, and therefore, do not constitute a substantial number of the employee complement as required by the first prong of the ***Harte*** test.

Petitioner has failed to show that the Allen facility is basically the same operation as the Richardson facility. The Allen facility does not share continuity of operations, methods, managerial hierarchy, customers, services and products with the Richardson facility. Moreover, the facilities are located in different cities and there have been significant changes in both the size and identity of the employee complement. Therefore, Petitioner also failed to establish the second prong of the ***Harte*** test.

<u>The Employer's Arguments</u>

The Employer advances numerous arguments in support of its contention that the instant petition should be dismissed. First, it argues that when it closed its Richardson facility, the bargaining unit was extinguished. ***St. Bernadette's Nursing Home,*** 234 NLRB 835 (1978). In ***St. Bernadette***, the Board found that a bargaining unit did not survive closure of the facility when only about 15 bargaining unit employees secured employment at the new facility, which was "a totally new operation" and employed about 207 employees. Although I agree that the petition in the instant case should be dismissed, I find the facts of ***St. Bernadette's Nursing Home*** to be distinguishable. The Allen facility employs a significantly greater number of former Richardson bargaining unit employees and, unlike the long hiatus between the closing of the St. Bernadette Nursing Home and the opening of the consolidated nursing home, the bargaining unit employees completed work at Richardson on March 28 and reported to work at Allen on March 30. Therefore, I do not find ***St. Bernadette's Nursing Home*** to be controlling.

Without explicitly saying so, the Employer appears to argue that because the Petitioner agreed to language in its Recognition Clause, which defined the unit as being employed at "Collins Technology Park, Richardson, Texas", it is barred from seeking clarification of the Allen employees. This argument lacks support in Board law. As the Board, affirming an administrative law judge, noted, "It is the usual practice, particularly in single location units, to list the address of the employer's plant or store. I know of no case where the Board found that to be a waiver of representational rights at a replacement facility." ***King Soopers, Inc.,*** 332 NLRB 32, 38 (2000). In addition, the administrative law judge noted that any waiver of a statutory right must be clear and unmistakable. ***King Soopers, Inc.,*** 332 NLRB at 38 (citing ***Metropolitan Edison Co. v. NLRB,*** 460 U.S. 692 (1983). Although the record evidence reflects that Petitioner and Employer negotiated over the recognition clause and whether the union could represent other Sanmina employees in the Dallas-Fort Worth area, I decline to find a waiver because the record contains no clear and unmistakable waiver of the right to continue to represent employees if the facility was relocated.

Finally, the Employer urges that the standards articulated in ***Gitano Distribution Center,*** 308 NLRB 1172 (1992) be applied in this case. However, the Employer fails to acknowledge the Board's decision in ***Rock Bottom Stores,*** 312 NLRB 400 (1993) wherein the Board explicitly stated that ***Gitano*** "is inapplicable to situations where, as here, the entire bargaining unit is relocated and there has been no creation of a second bargaining unit" and reaffirmed ***Harte. Rock Bottom Stores,*** 312 NLRB at 402.

CONCLUSION

Petitioner seeks the clarification of "all employees who are performing work that was classified as bargaining unit work" at the Richardson facility or "that would have been classified as bargaining unit work had the Employer not transferred the bargaining unit to its Allen facility."

The Petitioner's petition is dismissed because the number of transferred employees did not constitute a substantial percentage (40% or more) of the new employee complement and the evidence does not establish that the Allen operations remained basically the same as the Richardson facility.

For these reasons, I need not address the request for work that "would have been classified as bargaining unit work". However, even if I were to address that issue, I would be forced to engage in speculation, because the evidence does not establish which products would have been classified as bargaining unit work.

ORDER

IT IS HEREBY ORDERED that the Petition be dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Order may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570. This request must be received by the Board in Washington DC by 5:00 p.m. EST on April 26, 2004. This request may not be filed by facsimile transmission.

Dated at Fort Worth, Texas this 12th day of April 2004.

/s/ Curtis A. Wells

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